Supreme Court, U.S.
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No. 94-419

In The

Supreme Court of the United States

October Term, 1994

JOAN R. EDWARDS,

Petitioner,

v.

THE GREAT-WEST LIFE ASSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the phrase "actively at work" as used in the ERISA-governed plan language at issue in this case is ambiguous under the federal common law interpreting ERISA?

2. Whether the authority cited by the Seventh Circuit Court of Appeals supports its interpretation of "actively at work" as the phrase is used in the plan language at issue in this case?

3. Whether the reading of the plan language at issue in this case advanced by petitioner would violate applicable rules of contract interpretation?

LIST OF PARTIES AND RULE 29.1 LIST

The names of all parties to the proceeding in the Court of Appeals appear in the caption of this case.

Respondent The Great-West Life Assurance Company furnishes the following information in compliance with Supreme Court Rule 29.1:

Parent company of respondent: Great-West Lifeco, Inc.

Non-wholly owned subsidiary companies of respondent:

National Equipment Leasing, Ltd.

Shared Health Network Services, Inc.

Rostland Corporation

Peel Condominium Corp. No. 454

Bancsource Insurance Services, Inc.

Maxim Series Fund, Inc.

Westkin Properties, Ltd.

Private Healthcare Systems, Inc.

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BRIEF IN OPPOSITION OF RESPONDENT

The respondent, The Great-West Life Assurance Company ("Great-West"), by its undersigned counsel, respectfully requests that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit for review of the judgment in this case.

OPINIONS BELOW

The United States District Court for the Eastern District of Wisconsin entered judgment in favor of the petitioner on May 27, 1993. The District Court filed a written decision and order the same day that was not published and that is attached at pp. 20-29 of the petition for certiorari.

The United States Court of Appeals for the Seventh Circuit reversed the District Court's judgment and directed dismissal of this action by written decision published at 20 F.3d 748 on April 1, 1994. That decision is attached at pp. 13-19 of the petition for certiorari. By written, unpublished order the Court of Appeals denied petitioner's petition for rehearing with suggestion for rehearing *en banc* on June 2, 1994. (Supp. App., *infra*, p. A-1)

Pursuant to the mandate issued by the Court of Appeals, the District Court dismissed this action and entered judgment for the respondent on June 15, 1994. (Supp. App., *infra*, pp. A-2, A-3)

JURISDICTION

Petitioner filed an action in the Circuit Court in and for Waukesha County, Wisconsin. To the extent the petitioner purported to state a claim, she did so because she claimed the right of a plan participant or beneficiary to sue for recovery of benefits under an ERISA-governed employee benefit plan pursuant to 29 U.S.C. § 1132(a)(1)(B). Jurisdiction over the action was proper pursuant to 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331. Respondent Great-West removed the action to the United States District Court for the Eastern District of Wisconsin pursuant to 28 U.S.C. §§ 1441 and 1446. The United States Court of Appeals for the Seventh Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is proper pursuant to 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

A. Statement of Facts

Petitioner Joan R. Edwards is the surviving spouse of Thomas Edwards, who was employed by Quad Graphics beginning January 3, 1990. Under his terms of employment Mr. Edwards was eligible to participate in an employee welfare benefit plan maintained by his employer ("the plan") and funded through group insurance policies purchased from respondent, Great-West. The plan provided accidental and specified death benefits upon the death of a covered employee.

ERISA requires that employee welfare benefit plans be maintained pursuant to a written instrument. 29 U.S.C. § 1102(a)(1). The group insurance policies used by Mr. Edwards' employer to fund certain plan benefits contain the written eligibility requirements an employee must satisfy prior to obtaining coverage under the plan. Great-West issued two separate group insurance policies providing accidental and specified death benefits. The provisions that address eligibility and the effective date of coverage provide that:

> EMPLOYEES ELIGIBILITY FOR INSURANCE
>
> An employee whose service commences on or after January 1, 1990, is eligible: the first day of the insurance month coinciding with or next following the date on which he completes 60 days of continuous service. Employees starting between the first and tenth of the month will be counted as having started on the first of that month.
>
> EFFECTIVE DATE OF AN ELIGIBLE EMPLOYEE'S INSURANCE
>
> . . . It is, however, specifically provided that insurance of any employee who is not actively at work on the date his insurance would otherwise become effective shall not become effective until the date of his return to work.

On February 27, 1990, after working until 3:30 p.m., Mr. Edwards went home and accidentally fell down the basement stairs of his Oconomowoc, Wisconsin home. He was hospitalized in a coma until his death the evening of March 1, 1990. Thus, Mr. Edwards did not report to work

for his regularly scheduled shifts on February 28 and March 1, 1990.

Petitioner, as the designated beneficiary of Mr. Edwards, submitted claims for specified and accidental death benefits under the plan. Great-West denied these claims because Mr. Edwards was not actively at work on March 1, 1990, and therefore did not become eligible under the plan. Petitioner then filed this action.

B. Course of Proceedings Below

Petitioner originally filed suit in Waukesha County, Wisconsin Circuit Court, alleging breach of contract, bad faith refusal to pay insurance benefits and breach of fiduciary duty. She grounded each of those claims in Wisconsin state law, and based the claims upon the denial of benefits which she alleged were due under the plan. The plan is an employee welfare benefit plan as defined under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Accordingly, Great-West removed the case to the United States District Court for the Eastern District of Wisconsin, as ERISA preempted petitioner's claims, which could have been dismissed on that ground. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 57 (1987).

In lieu of dismissal and refiling of petitioner's claims, or a motion by the petitioner to allow amendment of her claims to conform to the applicable law, the parties stipulated that the court could consider petitioner's claims for purposes of this suit as a claim for recovery of benefits under 29 U.S.C. § 1132 without prejudice to Great-West's

defenses that petitioner failed to state a claim upon which relief can be granted.

The parties also stipulated that the district court should resolve the petitioner's claim on cross-motions for summary judgment on the legal question of whether Mr. Edwards was eligible for death benefits. The parties stipulated to the facts, including the relevant plan language quoted above.

The District Court granted petitioner's motion and denied Great-West's motion, entering judgment in favor of petitioner. The Court of Appeals reversed the District Court's judgment and directed dismissal of this action. The Court of Appeals subsequently denied petitioner's petition for rehearing with suggestion for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision in this case is not a matter of federal constitutional or statutory interpretation justifying attention by this Court. Rather, its application of the federal common law of ERISA as used to interpret plan language is not in conflict with other circuit courts of appeals. Moreover, the Court of Appeals relied upon analogous authority and its decision is well-grounded in the plan language at issue. The question resolved by the Court of Appeals is not sufficiently novel or important to warrant attention by this Court. This case presents a language specific inquiry that cannot produce a decision of broad application because minor language differences

may in an appropriate case dictate an entirely different result.

I. THE DECISIONS OF THE SEVENTH AND ELEVENTH CIRCUIT COURTS OF APPEALS EACH SUPPORT THE INTERPRETATION OF THE PLAN PROVISION "ACTIVELY AT WORK" IN THIS CASE.

Petitioner asserts that a "direct conflict" (Cert. Petition p. 4) exists between the Seventh and Eleventh Circuits Courts of Appeals which this Court should resolve. Petitioner contrasts the allegedly "broad" construction of "actively at work" in *United of Omaha Life Insurance Co. v. Sun Life Insurance Co.*, 894 F.2d 1555 (11th Cir. 1990), with the purportedly unduly "narrow" construction of that phrase in this case.

A true conflict does not exist between those two decisions, however. The Eleventh Circuit in *Sun Life* did not interpret "actively at work" differently than the Seventh Circuit did in this case. It found remarkably similar policy language to be "clear," and thus presumably unambiguous and not a candidate for interpretation in favor of the insured. 894 F.2d at 1560.

Numerous important distinctions exist between *Sun Life* and this case. The *Sun Life* decision interprets an insurance policy *outside of the ERISA and federal common law context* for purposes of ruling upon termination of (rather than eligibility for) coverage. The crux of the dispute in *Sun Life* was what the parties understood the phrase "active employment" to mean between the time an insurance policy took effect and the time the insured

received booklets defining that language. *Id.* The Eleventh Circuit held that the "active employment" requirement used for purposes of termination of coverage was ambiguous, and therefore the requirement would not be construed to terminate coverage for employees out on short-term sick leave. *Id.* at 1565.

State laws often require post-termination insurance coverage. *See, e.g.*, § 632.897, Wis. Stats. (Supp. App., *infra*, p. A-4) Thus, there is a reason for contingencies in termination language which does not exist in eligibility language. Further, termination provisions come into play only if an employee is covered, and are not inconsistent with or determinative of eligibility provisions.

Significantly, the Eleventh Circuit in *Sun Life*, in reversing the district court's grant of summary judgment on the claim of another employee, concluded that policy provisions for "Eligible Employees" remarkably similar to those at issue in Great-West's policies were "clear", and thus presumably unambiguous. 894 F.2d at 1559-60. The Eleventh Circuit concluded that if that language had controlled when another employee had enrolled for coverage, the summary judgment decision for the insurer would have stood. *Id.* at 1560.

This conclusion within the *Sun Life* opinion itself, as well as the other distinctions listed, demonstrate that there is no conflict between *Sun Life* and the Court of Appeals' opinion below. The Eleventh Circuit in *Sun Life* and the Court of Appeals in this case reached the same conclusion: the eligibility requirement that an employee be "actively at work" to be covered is clear and unambiguous. Consequently, no basis exists for construction in

favor of the employee. *Compare Sun Life*, 894 F.2d at 1560 *with Edwards v. Great-West Life Assurance Co.*, 20 F.3d 748, 749 n.1 (7th Cir. 1994). Although petitioner compares an ERISA-governed case and a non-ERISA case, the Seventh and Eleventh Circuits are not in disagreement about the fundamental legal principles involved, nor was the legal reasoning employed to reach the two decisions inconsistent. The Court of Appeals' decision below has merely created an adverse ruling to the petitioner. Accordingly, no conflict exists that requires this Court's consideration.

II. THE CASES RELIED UPON BY THE SEVENTH CIRCUIT COURT OF APPEALS ARE ANALOGOUS TO THIS CASE AND SUPPORT ITS DECISION.

Unable to cite a contrary holding with similar facts, petitioner attacks the authority relied upon by the Court of Appeals in support of its decision in this case. But the numerous cases that have found the phrase "actively at work" to be unambiguous, despite parties urging conflicting constructions, have similarly interpreted analogous policy provisions in comparable factual circumstances, and are thus persuasive authority on the question presented.

The central case upon which the Court of Appeals relied to render its decision, *Todd v. Dow Chemical Co.*, 760 F.2d 192 (8th Cir. 1985), and the case relied on in *Todd* for the language considered, *Smillie v. Travelers Ins. Co.*, 302 N.W.2d 258 (Mich. App. 1980), interpret language highly similar to that at issue in this case. *Compare* 302 N.W.2d at 259 (employee eligible for benefits "provided that no

Employee who is not actively at work performing all his duties of his employment with the Employer at his customary place of employment on the date his insurance becomes effective shall be insured until he returns to active work and the performance of all such duties") *with supra*, p. 3. The courts in *Todd* and *Smillie* found the phrase "actively at work" to be clear and unambiguous. *Todd*, 760 F.2d at 194; *Smillie*, 302 N.W. 2d at 259.

The same is true for the other cases petitioner seeks to distinguish. In none of the cases cited did the insurance policy in dispute specifically define "actively at work", yet in each the courts interpreted the policy according to the canons of contract construction and concluded that the phrase was unambiguous. *See, e.g., Velez v. Crown Life Ins. Co.*, 599 F.2d 471, 475-76 (1st Cir. 1979); *Credeur v. Continental Assurance Co.*, 502 So. 2d 214, 217, 219 (La. App. 1987); *Carnes v. Woodmen Accident & Life Co.*, 746 S.W.2d 105, 106-07 (Mo. App. 1988); *Rabinovitz v. Travelers Ins. Co.*, 11 Wis. 2d 545, 553, 105 N.W.2d 807, 812 (1960).[1]

Moreover, the decisions in *Elsey v. Prudential Ins. Co.*, 262 F.2d 432, 433 (10th Cir. 1958), and *Riggs v. Metropolitan Life Ins. Co.*, 977 F.2d 573 (4th Cir. 1992) (text in WESTLAW), are not distinguishable on the grounds petitioner

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[1] Petitioner's assumption that the policies in *Gulf Life Ins. Co. v. Hickey*, 476 So. 2d 762 (Fla. App. 1985) and *Starlite Services v. Prudential Ins. Co.*, 418 So. 2d 305 (Fla. App. 1982) "must have fully defined 'actively at work' with more restrictive language" (Cert. Petition p. 8) lacks any foundation. Her attempt to distinguish the cases must fail.

cites. (Cert. Petition p. 8) These cases involve analogous facts and policy provisions.

In *Elsey*, the plaintiff's deceased wife had an effective date of insurance of October 26, 1957, but that date fell on a Saturday. She did not report to work on Friday the 25th and became ill on the 26th. She later died on October 29th, having never returned to work. The trial court held and the Tenth Circuit affirmed that she was not actively at work on October 26th because she was ill and was never insured under the policy since she never returned to active work. 262 F.2d at 435. Just as at bar, the policy in *Elsey* contained "continuous service" and "actively at work" provisions, between which the Tenth Circuit found no conflict. In reading the two provisions together, the court found that the parties intended that an effective date be contingent upon the insured being actively at work on that specific date, *id.* at 434, which is a common sense reading of the policy language in this case.

In *Riggs*, a deceased husband had applied for certain supplemental group life benefits under his employer's welfare benefit plan. He had filled out and filed his portion of the application on October 16, 1990, while still employed as a full-time employee. The plan at issue discussed eligibility for "regular, term, whole time or part-time employees with six month of Net Credited Service." A second part of the plan regarding "How to Join/ When Coverage Begins" stated that if an employee did not enroll within thirty-one days after becoming eligible, supplementary coverage became effective only on the date evidence of good health is accepted as satisfactory by the insurance company and while the employee was "actively at work." The Fourth Circuit found that even if

her husband had satisfied the initial eligibility section of the plan description, coverage would not have become effective because he was not "actively at work" at any time after applying for the plan. 977 F.2d 573, at *3. The plaintiff's argument that "actively at work" was ambiguous was rejected. *Riggs*, with its eligibility/effective date dichotomy, is similar to this case. (*See* Counterstatement of the Case, *supra*, p. 3)

The authority relied on below by the Seventh Circuit interpreted similar insurance policy language and concluded that "actively at work" is a clear and unambiguous phrase routinely used in insurance contracts and employee benefit plans. This provision is "written in a manner calculated to be understood by the average plan participant." 29 U.S.C. § 1022(a)(1). The Seventh Circuit cited those cases because the courts therein found highly similar language to be unambiguous. The authorities relied upon by the Court of Appeals are not distinguishable as petitioner claims.

Petitioner's wish for "the language of the policy [to] specifically identify or define what 'actively at work' means" (Cert. Petition p. 8) is unrealistic and unnecessary. An employer or an insurer need not and cannot define each and every term or phrase in an employee benefit plan or an insurance policy that funds plan benefits. *See Lorenzen v. Employers Retirement Plan of the Sperry and Hutchinson Co., Inc.*, 896 F.2d 228, 236 (7th Cir. 1990). The canons of contract construction allow the parties (and the court) to rely first on common sense and the context of the plan as a whole. *Phillips v. Lincoln Nat'l Life Ins. Co.*, 978 F.2d 302, 307 (7th Cir. 1992). The ordinary and popular understanding of the phrase "actively at work," as

revealed in common language usage, requires that an employee be at work on the day insurance is to commence, or be capable of performing his job functions, at his usual place of business.[2] The Court of Appeals' adoption of this construction, in reliance upon analogous authority, need not be reviewed.

III. PETITIONER'S INTERPRETATION OF THE PLAN LANGUAGE AT ISSUE IN THIS CASE OFFENDS COMMON SENSE AND DELETES PROVISIONS IN VIOLATION OF CONTRACT CONSTRUCTION PRINCIPLES APPLICABLE IN ERISA CASES.

In the third question presented petitioner merely reasserts one of her central arguments below: the plan language does not support the Court of Appeals' decision because "actively at work" cannot mean the equivalent of "actually at work" since both phrases appear in separate eligibility clauses in the policy. Because "actively at work" is not defined, and "actually at work" is used in a separate section of the policy, petitioner asserts that Great-West must have intended different meanings for the two phrases. Petitioner therefore concludes that "[u]nder the language of the policy as a whole," she qualifies for benefits. (Cert. Petition p. 10)

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[2] *See, e.g., Turner v. Safeco Life Ins. Co.*, 17 F.3d 141, 144-45 (6th Cir. 1994) (widow of partner in trucking firm brought action against insurer under ERISA for recovery of death benefit under group life policy; district court entered summary judgment for widow; Sixth Circuit Court of Appeals reversed, holding that partner was not "eligible employee" within meaning of policy because partner was not actively at work on or after the effective date of the policy).

Petitioner's argument in effect asserts that the use of both "actively at work" and "actually at work" within the plan must mean that "actively at work" does not require one to be on the job at the moment one is injured or dies, and thus that an employee need only be full-time, full-pay, and permanent to be "eligible" and "effective", and therefore covered, under the plan. At the least, according to petitioner's argument, Great-West's use of these two phrases must render "actively at work" ambiguous, leading to a ruling for her in this case.

The Court of Appeals correctly rejected this argument, *see* 20 F.3d at 749 n.1, when it concluded that any ambiguity in interpretation of the phrase "actively at work" was insufficient to invoke the doctrine of *contra proferentem* such that a "tie" need be broken in petitioner's favor. *Id.* The Court of Appeals found that regardless of the interpretation of "actively at work" adopted, Mr. Edwards did not satisfy that phrase "when he lay in a coma on the last day of the eligibility period." *Id.*

Petitioner's construction attempts to stretch "actively at work" to mean "remaining in the active employ of the employer", hoping to find ambiguity such that the policy language will be interpreted against Great-West. But the terms of an ERISA-governed insurance policy are to be interpreted " 'in an ordinary and popular sense as would a [person] of average intelligence and experience.' " *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1441 (9th Cir. 1990) (quoting *Allstate Ins. Co. v. Ellison*, 757 F.2d 1042, 1044 (9th Cir. 1985)); *see also* 29 U.S.C. § 1022(a)(1). Reviewing the plan language in this manner reveals the flaws in petitioner's construction.

If an employee only had to be a permanent, full-time employee and on full pay to become "eligible" and "effective", as is the consequence of petitioner's construction, then "actively at work" has no meaning in the separate clauses of "eligibility" and "effective date" in the plan. (*See* Counterstatement of the Case, *supra*, p. 3) Regardless of ability to work, the employee would be eligible for coverage, whether the employee had worked 1 day or 59 days. Such a construction is unreasonable and not the intent of the "eligibility" requirement.

Further, the "effective date" provision contains a second clause which states that if an employee is not "actively at work" the coverage becomes effective upon the employee's "return to work." (*See* Counterstatement of the Case, *supra*, p. 3) The plan defines "work" as requiring "active and full-time work in the service of the employer." This requires more than simply being a full-time employee. However, under petitioner's construction, the "return to work" provision and the definition of "work" lack meaning. Moreover, the plan's definition of "service" requires employment at the employer's "usual and customary place of business", a definition a hospitalized employee cannot satisfy.

Petitioner's construction improperly renders specific provisions in the "eligibility" language meaningless, contrary to the canons of contract construction. *See, e.g., Reiherzer v. Shannon*, 581 F.2d 1266, 1272-73 (7th Cir. 1978). It does not interpret the phrase in a popular and common sense manner and results in the deletion of contract provisions.

Because the Court of Appeals fully considered and correctly rejected petitioner's construction of the plan language, the petition for a writ of certiorari should be denied.

CONCLUSION

For all of the reasons discussed above, respondent, The Great-West Life Assurance Company, respectfully submits that the petition for a writ of certiorari should be denied.

Dated this 30th day of September, 1994.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

June 2, 1994.

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Stanley J. Roszkowski, District Judge*

JOAN R. EDWARDS, Plaintiff-Appellee, No. 93-2486 vs. THE GREAT-WEST LIFE ASSURANCE COMPANY, Defendant-Appellant.	)	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 92 C 41 Terence T. Evans, *Chief Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by plaintiff-appellee on April 18, 1994, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a hearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

---

* The Honorable Stanley J. Roszkowski, District Judge for the Northern District of Illinois, is sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOAN R. EDWARDS,

Plaintiff,

v. Civil Action No. 92-C-41

THE GREAT-WEST LIFE ASSURANCE COMPANY,

Defendant.

ORDER

Pursuant to the mandate issued by the United States Court of Appeals for the Seventh Circuit on June 13, 1994, IT IS ORDERED that the clerk of court enter judgment dismissing this case.

Dated at Milwaukee, Wisconsin this 14th day of June, 1994.

BY THE COURT:

/s/ _____
TERENCE T. EVANS
CHIEF JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOAN R. EDWARDS, JUDGMENT IN A CIVIL CASE

Plaintiff,

v. Case No. 92-C-41

THE GREAT-WEST LIFE ASSURANCE COMPANY,

Defendant.

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by the Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to the mandate issued by the United States Court of Appeals for the Seventh Circuit on June 13, 1994, this action is dismissed.

6/15/94
Date

Sofron B. Nedilsky
Clerk

/s/ _____
(By) Deputy Clerk

632.897. Hospital and medical coverage for persons insured under individual and group policies.

. . . .

An insurer issuing or renewing a group policy on or after May 14, 1980 and every insurer on and after the date which is 2 years after May 14, 1980 shall permit the following persons who have been continuously covered under a group policy for at least 3 months to elect to continue group policy coverage under sub. (3) or to convert to individual coverage under sub. (4):

Id. at (2)(b)

. . . .

3. The spouse or dependent of a group member if the group member dies while covered by the group policy and the spouse or dependent was also covered.

(c) Group policy coverage of a terminated insured who is entitled under par. (b) to elect continued group policy coverage or conversion to individual coverage and coverage of the spouse and dependents of the terminated insured provided for in the group policy continues until the terminated insured is notified under par. (d) of the right to elect continued or conversion coverage if the premium for the coverage continues to be paid.